105.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

J. O. COMSTOCK,
Plaintiff and Appellant,

vs.

WM. L. EAGLETON,
Defendant and Appellee.

[redacted]

File No. 19048.

BRIEF OF J. O. COMSTOCK, PLAINTIFF AND APPELLANT.

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J. O. COMSTOCK,
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vs.

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Defendant and Appellee.

Term No. 397.

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BRIEF OF J. O. COMSTOCK, PLAINTIFF AND APPELLANT.

STATEMENT OF CASE.

On the 7th day of February, 1900, the plaintiff and appellant, J. O. Comstock, was found guilty of bastardy, by a jury, in the Probate court of Pawnee county, Oklahoma Territory; and thereupon the court, by the appellee and defendant Eagleton, as the judge thereof, rendered its judgment whereby the said J. O.

Comstock was ordered to pay to the mother of said bastard child the sum of $840.00, and give a bond to the Territory of Oklahoma, with good and sufficient sureties, to be approved by the judge of the Probate court, to secure the performance of said judgment. Said judgment further provided:

"It is further ordered by the court that the defendant J. O. Comstock be remanded to the custody of the sheriff of Pawnee county, Oklahoma Territory, *to be* by him *committed to the common jail of Pawnee county, until the bonds above mentioned are made and approved and the costs of this prosecution paid.*" (Pgs. 16-17 Record.)

That the said J. O. Comstock, appellant, considered that portion of the judgment *remanding him to jail* null and void, and therefore, made no effort to furnish the aforesaid bond.

That thereafter, and on the 9th day of February, 1900, Wm. L. Eagleton, defendant and appellee, as the Probate Judge of Pawnee county, Oklahoma Territory, issued a warrant of commitment to T. M. Grant, the then sheriff of said county, upon said judgment, which recited the above judgment in full, and commanded the sheriff as follows; "And you, the said sheriff of Pawnee county, are hereby commanded to safely keep said J. O. Comstock *until the bonds above mentioned are duly made and approved by the judge of the probate court, and until he pays the costs of the prosecution,* or until

he shall be discharged therefrom by due course of law." (Pgs 26-27 Record.)

That thereupon and under said *warrant of commitment* the said J. O. Comstock was remanded to the jail of Pawnee county, Oklahoma Territory, and there incarcerated under said commitment for one hundred seventeen days, and until he was released from imprisonment by a judgment of the supreme court of Oklahoma, in a cause entitled "In the matter of the application of J. O. Comstock for a writ of habeas corpus," (10 Okla. 299) the court in said cause holding: "A bastardy proceeding is special in character, and is in the nature of a civil proceeding. *There is no authority given to impose imprisonment as part of the original judgment in such cases, in order to compel the judgment debtor to secure the payment of the judgment by executing bond.*"

That thereafter, and on the 11th day of October, 1900, J. O. Comstock, plaintiff and appellant herein, brought an action in the district court of Pawnee county, Oklahoma Territory, against the said Wm. L. Eagleton, defendant and appellee, for damages for his false imprisonment one hundred seventeen days *caused by the issuance and execution of said warrant of commitment.*

That thereafter and on the 16th day of November, 1900, the said J. O. Comstock filed an amended petition in said cause. (Pgs. 25 to 29 incl. Record.)

That thereafter and on the said 16th day of November, 1900, the said Wm. L. Eagleton, appellee and defendant, filed his demurrer to said amended petition, which demurrer was to the effect that said petition does not state facts sufficient to constitute a cause of action. (Pg. 32 Record.)

That thereafter and on the said 16th day of November, 1900, the said demurrer was sustained, the court holding that said amended petition does not state facts sufficient to constitute a cause of action; and to which ruling appellant J. O. Comstock then and there duly excepted, and elected to stand upon his said amended petition. Whereupon said cause was dismissed; and to which judgment plaintiff duly excepted. (Pg. 33 Record.)

The plaintiff (appellant herein) prosecuted an appeal to the supreme court of the Territory of Oklahoma, from said judgment sustaining said demurrer and dismissing said cause, which said judgment of the district court was afterwards, on the 16th day of July, 1902, confirmed by the supreme court of the Territory of Oklahoma as appears in 11th Oklahoma Rep. 487, and set forth upon Pgs. 44 to 48 inclusive, of the Record.

ASSIGNMENT OF ERROR.

I. The court erred in holding that a probate judge is not amenable to a civil action for false impris-

onment caused by his act in the wrongful and illegal issuance of a void warrant of commitment.

II. The court erred in sustaining the demurrer to the amended petition of the plaintiff in error.

ARGUMENT.

FIRST ASSIGNMENT OF ERROR.

TWO PROPOSITIONS are involved in the FIRST ASSIGNMENT of error, to-wit:

Proposition (A.) Was the act of the appellee in issuing the warrant of commitment under which the appellant was imprisoned, a *Ministerial*, or *Judicial* act?

Proposition (B.) If a ministerial act, is the probate judge personally liable in damages for his wrongful and illegal performance of such act whereby appellant was unlawfully imprisoned?

Proposition (A:) We concede that the probate court had the power to enter a judgment for the appellant to pay $840.00 to the mother of the bastard child; but insist that such portion of said judgment imposing imprisonment was surplusage and void, and that the *issuance* of the *warrant of committment* thereon by the judge of said probate court was a *ministerial* and *not* a *judicial act.*

The issuance of a mesne or final process in a civil action, or of a mittimus in a criminal proceeding, is a *ministerial act.* The distinction between the minister-

ial and judicial powers of a probate court or of a justice of the peace, are well settled. A justice of the peace has no clerk for his court; but he acts as clerk as well as court. In issuing mesne and final processes, his duties and liabilities are the same as that of any other court issuing any other process.

Ada County v. Ryals, 39 Pac. 556.
Banister v. Wakeman, 23 Atl., 585.
Exparte Virginia 100 U. S. 339.
United States v. Ambrose, 2 Fed. 556.

When in the progress of a suit a final judgment has been rendered, there can remain no other judicial duty to be performed. The court or magistrate has then no longer a question upon which to deliberate, or a cause between contending parties to decide. Nothing is left to be done but to carry the judgment into effect. That, under the law, is accomplished by means of an execution. It was early determined that the issuance of an execution by a justice of the peace was merely a *ministerial act*; and in a particular instance, *where such process was issued erroneously, the magistrate was held responsible in damages for the commitment to prison of a party under it.*

Fisher v. Deane, 107 Mass. 118.
Sullivan v. Jones. 2 Gray, 570.
Briggs v. Wardwell, 10 Mass. 356.

A magistrate who has rendered judgment for the plaintiff in an action pending before him, and on re-

quest for an execution has issued one, which is invalid on its face, is liable for such damages as are the natural necessary and proximate consequences of his act.

Noxon v. Hill, 2 Allen 215.
Taylor v. Doramus 16 N. J. L., 473.
Graham v. Todd, 9 Vt., 166.
Insurance Co. v. Cummings, 11 Vt., 503.
Kendall v. Powers, 4 Metcalf, 185.
Allen v. Gray, 11 Conn., 103.
Goetraine v. McCame, 3 Dev. 308.
Jones v. Elliott, 35 Maine, 137.
Tyler v. Alford, 38 Maine, 582.
Tompkins v. Sands, 8 Wend, 462.
Houghton v. Swartout, 1st Denico, 589.
Hill v. Bateman, 2 Strange, 410.

A judicial officer may be required by law to discharge other than judicial duties. He may by authority of law, perform ministerial acts; but when performed they do not become judicial acts because performed by a judicial officer.

People v. Bush, 40 Cal., 344.
Ezmerald v. 3 Dist. Ct., 5 Pac. 64.

Judge Bailey (2nd Vol. Bailey on Jurisdiction, § 901) discussing the distinction between judicial and ministerial acts says: "The judicial character of the officer is not a protection in such cases * * * * It is the character of the act, and not the character of the officer that determines the question of liability * * * * Many cases reported in books where the duties of the judicial

officer are judicial in particular proceedings to a certain stage, when thereafter as to subsequent proceedings, they are ministerial merely." *It is therefore manifest that the issuing of the warrant of commitment under which the plaintiff in error was deprived of his liberty was not a judicial, but a ministerial act.*

Proposition (B.) Probate judges and justices of the peace are liable in damages for wrongful and illegal acts performed in the exercise of their ministerial powers and duties.

Banister v. Wakeman, 23 Atl., 587.
Bailey on Jurisdiction, Vol. 2, § 900.

When a ministerial duty or authority is annexed to a judicial office, if the officer executes that ministerial duty wrongfully, whether by mistake or fraud, he is answerable to the injured party in a suit at law.

Taylor v. Doremas, 16 N. J. L., 473.
Bailey on Jurisdiction, 2 Vol., §901.

A justice of the peace who issues an execution containing a demand to arrest the body of the judgment debtor, and an attorney who procures such execution to be issued, and causes the debtor to be arrested thereon, are jointly liable to the debtor in trespass.

Sullivan v. Jones, 2nd Gray, 570.

A justice of the peace who issued an execution illegally and wrongfully, was held liable to the party

against whom such execution issued, and who was imprisoned thereon, in an action of trespass.

Briggs v. Wardwell, 10 Mass., 355.

Where a justice of the peace has power only to fine and not to imprison, for contempt of court, he will be liable in damages for false imprisonment for ordering the incarceration of the person for such offense.

12 Ency. Law, 2nd Ed., Pg. 762.
Newton v. Locklin, 77 Ill., 103.

A judicial officer who issues a warrant of arrest, void on its face, is liable in damages for false imprisonment, although he acts in good faith, and there is before him sufficient proof to have authorized the issuance of a valid warrant.

12 Ency. Law, 2nd Ed., Pg. 762.

A probate judge is liable for the illegal issuance of a marriage license.

Wood v. Farnell, 50 Ala., 546.

The following authorities hold that inferior courts, such as justices of the peace and probate judges, are liable in damages for the wrongful performance of a ministerial duty.

Noxon v. Hill, 2 Allen, 215.
Kendall v. Powers, 45 Mass., 553.
Allen v. Gray, 11 Conn., 103.
Coltrain v. McCain, 3 Dev, 318.

Jones v. Elliott, 35 Maine 137.
Tyler v. Alford, 38 Maine, 582.
Tompkins v. Sands, 8 Wend, 462.
Houghton v. Swartout, 1st. Denio., 589.
Hill v. Bateman, 2 Strange, 410.
Fischer v. Dean, 107 Mass.,118.
Grider v. Tally, 77 Ala., 422.
State ex rel Attorney General v. Lazarus, 1 So., 361.
Stone v. City of Augusta, 46 Maine, 127.
Stone v. Graves, 8 Mo., 148.

We submit that the overwhelming weight of authority is to the effect that the issuing of the warrant of commitment in this case was a *ministerial*, and *not a judicial act. That by the overwhelming weight of authority a probate judge is liable in damages for the wrongful performance of a ministerial duty.* That the defendant and appellee, for said reasons, is liable to the plaintiff and appellant upon the cause of action set out in the plaintiff's petition.

The supreme court of the Territory of Oklahoma based its decision in the case at bar upon the authority of TWO decisions, viz: Cooke v. Bangs, 31 Fed., 640; and Downing v. Herrick, 47 Maine, 462. *Neither* of of which *decisions are applicable to the case at bar.* In the case of Cook v. Bangs, supra, the only question decided by the court was that a judicial officer was not liable in damages for any erroneous or wrongful act done in the performance of his judicial duty. In the case of Downing v. Herrick, 47 Maine, 462, the court held that under the statutes of Maine at that time, a

justice of the peace had authority and right to impose as part of the sentence, imprisonment for non payment of costs. That because of that fact a justice of the peace was held not liable in damages to a party who was imprisoned on a mittimus issued by a justice of the peace on a sentence of imprisonment for non payment of costs. We quote the following excerpts from said opinion: "The conviction of the plaintiff by the defendant, at a justice court, held by him as a magistrate, duly qualified as such, was under the statutes of 1858, C 33, § 26. No power is expressly conferred upon a justice of the peace to impose payment of costs, upon conviction of a violation of that section, as a part of the sentence, THOUGH IN OTHER SECTIONS OF THE SAME CHAPTER IT IS NOT ONLY PROVIDED THAT HE MAY INCLUDE THEM IN THE SENTENCE, BUT IT IS MADE IMPERATIVE THAT HE SHALL DO SO. * * * * The provisions referred to with authorities in the R. S. of 1841, are substantially re-enacted in the revised code of 1858, as in C. 132; and it is quite manifest in both, that the legislature assumed that the power exercised by the defendant existed. The omission of the statutes of 1857, C. 33, § 26, to require that costs in the prosecution should constitute a part of the sentence, when it was made obligatory to do so, in other section of the same chapter, shows that therein it was designed to be submitted to the descretion of the magistrate to include them or not, in the sentence, as in other statutes previously existing."

An examination of the *two authorities upon which the decision of the supreme court of Oklahoma is based, will* clearly *show* that *neither* of them *are applicable to the question involved in this suit.*

SECOND ASSIGNMENT OF ERROR.

Our contention herein, to-wit: "The court erred in sustaining the demurrer to the amended petition of the plaintiff in error," needs no argument. The amended petition (Pgs 25 to 29, inc., of the record) manifestly states a good cause of action, in the light of the authorities submitted in this brief.

CONCLUSION.

Upon the merit of the important principles involved herein, we have confidence that this court will sustain our contention, and reverse the judgment of the supreme court of Oklahoma.

Respectfully submitted,

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